**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**Bypass Appeal from the Oakland County Circuit Court**

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**ARTHUR Y. LISS and BEVERLY LISS,**

*Plaintiffs-Appellees,*

-vs-

**LEWISTON-RICHARDS, INC.,** a Michigan Corporation, and **JASON P. LEWISTON,**

*Defendants-Appellants,*

and

LEWISTON-RICHARDS, INC.,

*Counter-Plaintiff,*

-vs-

ARTHUR Y. LISS and BEVERLY LISS,

*Counter-Defendants.*

/

Supreme Court No. 130064

Court of Appeals No. 2663236

Oakland County Circuit Court
No. 03-046857-CK

Honorable Fred M. Mester

# BRIEF OF APPELLEES

## ORAL ARGUMENT REQUESTED

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## JURISDICTIONAL STATEMENT

For purposes of this appeal, Appellees do not contest the jurisdictional statement submitted by Appellants.

# COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

## STATUTE TO BE INTERPRETED

MCL 445.904(1)(a) of the Michigan Consumer Protection Act, MCL 445.901, *et seq* (MCPA), provides in pertinent part:

> (1) This act does not apply to . . . the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority or of the United States.

MCL 445.904(4) provides that "[t]he burden of proving an exemption from this act is upon the person claiming the exemption."

## QUESTIONS PRESENTED

**I.**

**Whether the non-exclusive regulations and remedies provided under Michigan's Occupational Code immunize licensed residential builders from liability under §4(1)(a) of the MCPA?**

Appellants say "yes."
Appellees say "no."
The trial court said "no."
The Court of Appeals did not address this question because this Court granted bypass review.

**II.**

**Whether Defendants met their burden of proving their claimed exemption as required by §4(4) of the MCPA?**

Appellants say "yes."
Appellees say "no."
The trial court said "no."
The Court of Appeals did not address this question because this Court granted bypass review.

## SUMMARY OF ARGUMENT

All 50 states, Washington D.C., and the territories, have enacted legislation similar to the MCPA.[1] "One of the most complex and important issues involving UDAP [unfair and deceptive acts and practices] statute coverage is the relation of UDAP statutes to practices regulated or permitted by other laws."[2] As one of the most comprehensive treatises on the subject explained:

> The fact that a business entity has a license from some governmental agency does not, of course, establish that it has acted without deception or unfairness.[fn] The question is whether the state UDAP statute applies to this type of transaction or this type of dealer, or whether other regulation displaces the UDAP statute's applicability.[3]

Nearly all UDAP statutes contain certain limited exemptions which are generally divided into two major categories: (1) UDAP statutes exempting specific regulated entities or all "regulated practices";[4] and (2) UDAP statutes exempting "practices permitted by law."[5] Our state's UDAP, the Michigan Consumer Protection Act (MCPA), falls into the second category, exempting "transactions or conduct *specifically authorized* under laws administered by a regulatory board or officer acting under statutory authority or of the United States." MCL 445.904(1)(a) (emphasis added). In the

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[1] See, National Consumer Law Center, *Statute by Statute Analysis of State UDAP Statutes*, 2005 Supplement, Appendix A (CD Rom), copy provided in Appellee's Appendix, pp 16b-38b.

[2] National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (6th Ed 2004), § 2.3.3.1, p 56.

[3] *Id.*, citing *Hartigan v Northern Illinois Mortgage Co*, 201 Ill App 3d 356, 559 NE2d 14 (1990).

[4] *Id.*, § 2.3.3.2., pp 57-58.

[5] *Id.*, §§ 2.3.3.3-2.3.3.3.2, pp 58-63.

treatise, *Unfair and Deceptive Acts and Practices*, the difference between the two categories is explained:

> Certain UDAP statutes exclude from UDAP coverage only practices "permitted" by law [fn] or "authorized" by a regulatory agency. This language exempts far fewer practices than statutes using the term "regulated," since a practice may be remedied by the UDAP statute where there is an insufficient showing that the particular challenged activity is specifically permitted or authorized by law. [fn] *An exemption for actions authorized by other laws does not preclude UDAP application to conduct regulated by these other laws, but only allows the defendant to assert compliance with other laws as a defense.* [fn] The seller has the burden of showing a practice is permitted [fn].[6]

In construing the "specifically authorized" exemption, the majority of courts have rejected approaches that look only to the "general transaction" or the type of industry involved. Rather, the courts have held that the remedial purposes of the legislation are best served by limiting the exemption to situations where "'a direct and unavoidable conflict exists between the application of the [MCPA] and application of the other regulatory scheme or schemes."[7] This Court, in *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617, 317 NW2d 805, 811 (1982), correctly analyzed the "specifically authorized" exemption and concluded that licensure and regulation under Michigan's Occupational Code did not exempt a real estate broker's mortgage writing activity from liability under the MCPA.

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[6] National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (6th Ed 2004), § 2.3.3.3.1, pp 58-59 (footnotes omitted; emphasis added), copy attached in Appellees' Index, pp 39b-44b.

[7] *Elder v Fischer,* 129 Ohio App 3d 209, 219, 717 NE2d 730, 737 (1998) (interpreting Ohio statute), quoting *Lemelledo v Beneficial Mgt Corp of America*, 150 NJ 255, 270, 696 A2d 546, 554 (1997) (interpreting New Jersey statute). Copies *Elder* and *Lemelledo* are attached at Apx 47b and 64b, respectively.

Michigan's Courts continued to recognize the distinction between mere licensure or regulation and "specifically authorized" transactions or conduct. See, e.g., *Price v Long Realty, Inc*, 199 Mich App 461, 502 NW2d 337 (1993) (rejecting exemption based on Occupational Code and holding real estate broker's misrepresentations actionable under MCPA, citing *Diamond*); *Baker v Arbor Drugs*, 215 Mich App 198, 544 NW2d 727 (1996) (rejecting exemption based on Occupational Code and holding pharmacy liable under MCPA for misrepresenting efficacy of its "Arbortech System").

However, following this Court's decision in *Smith v Globe Life Insurance Co*, 450 Mich 446, 597 NW2d 28 (1999), some Courts have begun to confuse mere licensure or regulation with "specifically authorized." Interestingly enough, the exemption at issue here, §4(1)(a), was found to be inapplicable because, at the time, §4(2) contained an "exception to the exemption" allowing private actions (§11) to be brought against insurance companies.[8] Nevertheless, this Court commented on the exemption in §4(1)(a), stating that the relevant inquiry was whether the "general transaction" was authorized.[9]

Unfortunately, the "general transaction" language in *Smith* has led some of our lower courts to conclude that mere licensure or regulation is the equivalent of "specifically authorized" and these courts have begun applying the exemption in §4(1)(a) to any industry regulated under Michigan's Occupational Code. Although the *Smith* Court was careful to point out that *Diamond* "controls the

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[8] Following *Smith*, the legislature quickly responded by enacting §4(3), which provides a specific exemption for acts or practices "made unlawful by Chapter 20 of the Insurance Code." MCL 445.904(3).

[9] *Smith*, 450 Mich at 465, 597 NW2d at 39.

resolution of this issue,"[10] and that "insurance companies are not like most businesses,"[11] this limiting language has been too often ignored, as illustrated by Defendants' citation to several Court of Appeals decisions applying the exemption whenever a regulated industry is involved.[12]

This brief will address why such an approach runs counter to the express language of the statute and would undermine the legislative intent of providing "an enlarged remedy for consumers who are mulcted by deceptive business practices." *Dix v American Bankers Life Assur of Fla*, 429 Mich 410, 418, 415 NW2d 206, 209 (1987).

First, applying elementary rules of statutory construction, every word in a statute should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare System,* 453 Mich 60; 631 NW2d 690 (2001). Statutory provisions must also be read in the context of the entire statute so as to produce a harmonious whole. *People v Lounsbery,* 246 Mich App 506, 633 NW2d 438 (2001). Where, as here, a remedial statute is under review, the statute must also be construed broadly for the benefit of the consumers it was intended to protect. *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 98, 537 NW2d 471, 473 (1995). Adopting a "general transaction" approach would render the words

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[10] *Smith*, 450 Mich at 463, 597 NW2d at 37.

[11] *Id.*, 450 Mich at 466, 597 NW at 38, n 12.

[12] The cases cited by Defendants have also been cited by the *Unfair and Deceptive Acts and Practices* treatise as illustrating the mistake a minority of courts have made in confusing "regulated with permitted." *Id.*, §2.3.3.3.2, Main volume and 2005 Supp, p 11, n 806, citing *Newton v Bank West* 686 NW2d 491 (Mich App 2004), *Love v Ciccarelli*, 2004 WL 981164 (Mich App 2004), *Shinney v Cambridge Homes, Inc*, 2005 WL 15492 (Mich App 2005).

"conduct" and "specifically authorized" nugatory, thereby narrowing the reach of the MCPA to all but an obscure handful of transactions.[13]

Second, the problem of unfair and deceptive practices in consumer transactions has reached epidemic proportions as is demonstrated by enactment of UDAP statutes in all 50 states, the District of Columbia and three U.S. territories (Apx 16b-38b). Legislatures across the country have recognized the need for broad-based remedies[14] and courts have been "loathe to undermine" legislative schemes that permit such practices to be attacked on several concomitant fronts, to-wit: private and attorney general enforcement actions under UDAP statutes, as well as enforcement by regulatory agencies.[15]

Further, the courts have opined that the typical remedies afforded by these statutes (e.g., statutory damages and attorney fees), are an important tool in avoiding the risk of under-enforcement. Noting that regulatory agencies are often over-worked, under-funded and subject to the ideological idiosyncracies of the industry being regulated, courts have warned that permitting blanket exemptions based on regulation alone would seriously undermine the intent of the legislature.[16] In this regard,

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[13] As numerous courts construing UDAP statutes have recognized, nearly all businesses affecting consumers and/or trade or commerce are regulated in some way. See, e.g., *Therrien v Resource Financial Group*, 704 F Supp 322, 328 (D NH 1989) (reasoning that automatic exemption from New Hampshire UDAP statute for regulated industries would cause the exemption to "swallow the rule.").

[14] Washington state, in particular, recently broadened the reach of its UDAP statute, by abandoning the "regulated" exemption and adopting the "specifically authorized" approach. *Vogt v Seattle-First National Bank*, 117 Wash 2d 541, 551, 817 P2d 1364, 1370 (1991).

[15] *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554, cited with approval in *Elder*, 129 Ohio App 3d at 218, 717 NE2d at 737.

[16] *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554; *Therrien*, 704 F Supp at 328.

the courts have held that a combination of consumer protection statutes providing for private and attorney general enforcement, and regulations prohibiting unfair or deceptive practices, evidence a legislative intent to provide for "a broad delegation of enforcement authority to combat consumer fraud."[17] Thus, the courts have held that merely holding a license and/or being subject to regulation by another body or under other laws is not sufficient to prove an exemption under the "specifically authorized" provision. Rather, the test applied by the majority of courts is whether application of the UDAP statute would create "a direct and unavoidable conflict" with the application of the another regulatory scheme.[18]

Here, Michigan's legislature has provided several indicia of its intent to protect consumers with a broad combination of enforcement tools. The MCPA itself contains a "savings clause," MCL 445.416, which provides that "[t]his act shall not affect any other cause of action which is available." The MCPA further provides for private enforcement (MCL 445.911) and attorney general enforcement (MCL 445.910). Moreover, the MCPA directs that the various regulatory boards have the authority to investigate acts or practices violating the MCPA and refer violations to the attorney general (MCL 445.917-445.921), thereby evidencing an intent that other regulatory schemes are not intended to supplant enforcement under the MCPA.

The Occupational Code, in turn, contains its own savings clause, MCL 339.601(9), which provides, "[t]he remedies under this section are independent and cumulative. The use of 1 remedy

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[17] *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554, cited with approval in *Elder*, 129 Ohio App 3d at 218, 717 NE2d at 737.

[18] *Lemelledo,* 150 NJ at 269-270, 696 A2d at 553-554 (1997).

by a person shall not bar the use of other lawful remedies by that person or the use of a lawful remedy by another person."

Even in *Kraft v Detroit Entertainment, LLC*, the Court recognized that a "savings clause," such as that found in the OC, signals that the regulation is cumulative, rather than preemptive. By way of example, the Court cited the Federal Communications Act, 47 USC 414, which provides "[n]othing in this action contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." *Id.*, 261 Mich at 547-548, 683 NW2d at 208.

In sum, nothing in the MCPA or OC suggests that the OC regulations and remedies are intended to be exclusive, or that the two acts are in any way inconsistent. Thus, there is no danger that subjecting residential builders to regulation under the MCPA and the OC would expose the industry to "a direct and unavoidable conflict."[19]

Third, applying *Diamond Mortgage*, a number the particular practices alleged by Plaintiffs in this case fall outside the acts or practices "specifically authorized" by Defendants' residential builder's license. By way of example, nothing in the Chapter 24 of the OC[20] specifically authorizes Defendants to misrepresent their experience and qualifications or the financing arrangements related to the purchase. Thus, even if §4(1)(a) is to be interpreted with reference to the "general transaction," the transactions at issue, i.e., misrepresenting the seller's experience and qualifications and

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[19] *Id.*; See, also, *Faulkner v Flowers*, 206 Mich App 562, 569, 522 NW2d 700, 703 (1994) (holding plaintiff could properly pursue remedies under both the wage and fringe benefit statute and the whistleblower protection act because the goals of the two statutes are complementary).

[20] MCL 339.2401-339.2411.

misrepresenting or failing to comply with the terms of financing, are not "specifically authorized" by the OC.

# COUNTER-STATEMENT OF FACTS

## A. NATURE OF ACTION

This matter arises out of a contract for the purchase and construction of a residential home.

## B. CHARACTER OF PLEADINGS AND PROCEEDINGS

Plaintiffs' Complaint alleges seven counts: (I) Breach of Contract; (II) Breach of Warranty; (IV) Violation of Michigan Consumer Protection Act; (V) Violation of Building Contract Fund Statute; (VI) Specific Performance; and (VII) Negligent Infliction of Emotional Distress (Apx 49a).

Defendants moved for partial summary disposition as to Count IV, arguing that, as a licensed residential builder, Defendants were exempt under §4(1)(a) because the Michigan Occupational Code covers the general transaction giving rise to this action and, thus, the transaction is "specifically authorized." The trial court denied the motion, finding that *Hartman v Eichhorn Building Co v Dailey*, 266 Mich App 545 (2005) (holding residential builders not exempt under §4(1)(a)), controlled (Apx 89a, p 12).

Defendants then filed an application for leave to appeal with the Court of Appeals and an application for bypass appeal with this Court on December 8, 2005, which application was granted. This sole issue on appeal is whether residential builders are exempt under §4(1)(a) of the MCPA because they are subject to non-exclusive regulation under Michigan's Occupational Code.

## C. SUBSTANCE OF PROOF

The December 22, 2000 Agreement of Sale between Lewiston Richards, Inc., as seller, and Arthur Y. Liss and Beverly Liss, as buyers, includes provisions regarding the construction of a residential dwelling, and the seller's experience and qualifications, and the seller's financing

arrangements (Agreement of Sale, Apx 1b). With respect to his experience and qualifications, the Seller represented that:

- it had substantial experience in the construction of custom homes;
- the Residence being constructed is of superior quality and workmanship and meets or exceeds the standards of excellence of similar homes of like kind, quality and price; and
- the buyers relied on the seller's expertise in entering into the Agreement.

*Id.*, ¶ 2. With respect to financing, the seller agreed that the amount of any construction mortgage (a collateral assignment of the Agreement) shall not be more than the sum of the "sum of the Seller's Purchase Price of the lot (or the Seller's equity in the lot) plus the vale of the work in place less the sum of the progress payments paid by Buyer to Seller." *Id.*, ¶ 8.

The seller's principal, Defendant Jason Lewiston, signed a Personal Guaranty in connection with the Agreement. Lewiston guaranteed that the seller would perform its obligations under the agreement including those in the limited warranty. Lewiston agreed that he would assume personal liability if a default existed that the seller failed to cure.

Plaintiffs' Second Amended Complaint attaches a copy of the Agreement, the Limited Warranty, and the Personal Guaranty.[21] Plaintiffs allege that seller did not have the experience in the construction of custom homes as represented in the Agreement. Second Amended Complaint, ¶ 17. Plaintiffs allege that he entered the Agreement and paid in excess of $2,000,000.00 based on seller's representation regarding its experience in the construction of custom homes and Lewiston's promise

[21] Plaintiffs' Second Amended Complaint, without exhibits, is contained in Appellants' Appendix at p 49a; the Exhibits to Plaintiffs' Second Amended Complaint, are attached in Appellees' Appendix (Agreement of Sale, p 1b; Limited Warranty, p 11b; and Personal Guaranty, p 14b).

of a "worry free" construction performance. Second Amended Complaint, ¶¶ 18-19. Plaintiffs allege that Defendants violated the Michigan Consumer Protection Act by: misrepresenting the characteristics, uses and benefits of the residence; misrepresenting the standard, quality, and grade of the residence, failing to complete the construction of the residence; making material misrepresentations and/or failing to advise of material information with respect to the transaction reflected in the Agreement. Second Amended Complaint, ¶ 34.

## D. OTHER MATTERS RELATING TO THE CONTROVERSY AND QUESTIONS INVOLVED

In *Smith v Globe Life Insurance Co*, 450 Mich 446, 597 NW2d 28 (1999), this Court found a "general" exemption for the insurance industry by interpreting §4(1)(a) as follows:

> . . . Contrary to the "common-sense reading" of this provision by the Court of Appeals, **we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited**.

460 Mich at 465 (bold added).

While this Court noted that the insurance industry is not like most businesses,[22] Defendants and a number of lower courts equated the foregoing "general transaction" inquiry to a directive requiring exemption of any business subject to licensure or non-exclusive regulation under Michigan's Occupational Code. Most appellate courts across the country, however, construe the "specifically authorized" inquiry much more narrowly, holding that the exemption applies only where there is a "direct and unavoidable conflict" between the consumer protection statute and another

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[22] *Id.*, 460 Mich at 466, n 12.

regulatory scheme.[23] For the reasons set forth in the Argument section of this brief, Plaintiffs respectfully urge that this more narrow inquiry is consistent with the language of the MCPA and the intent of the legislature, i.e., protection of Michigan consumers when purchasing goods and services for personal, family or household use.[24]

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[23] See, e.g., *Lemelledo*, 150 NJ at 270, 696 A2d at 554. The majority of states have adopted consumer protection statutes, most containing an exemption for conduct or transactions "specifically authorized" by other laws. Thus, a review of sister state law is instructive and will be addressed *infra*.

[24] See, e.g., *Dix*, 429 Mich at 418, 415 NW2d at 209; *Price*, 199 Mich App at 470-471, 502 NW2d at 342.

# ARGUMENT

## I. STANDARD OF REVIEW

This Court reviews the grant or denial of a motion for summary disposition *de novo*. *Spiek v Dept of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998).

Questions of statutory interpretation are also *de novo*. *Stanton v Battle Creek*, 466 Mich 611, 614, 647 NW2d 508 (2002). The statute at issue in this appeal, MCL 445.904(1)(a), provides:

> Sec. 4. (1) This act does not apply to either of the following:
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

The foregoing statutory provision is subject to MCL 445.904(4), which states that"[t]he burden of proving an exemption from this act is upon the person claiming the exemption."

The primary rule of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished. *Frankenmuth Mut Ins v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998).

The first step in that determination is to review the language of the statute itself. *In re MCI,* 460 Mich 396, 411; 596 NW2d 164 (1999). Words of a statute must be given their plain and ordinary meaning. *Robinson v City of Detroit,* 461 Mich 394, 402; 604 NW2d 300 (2000); *Hiltz v Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). Every word in a statute should be given meaning, and the court should avoid a construction that would render any part of the statute

surplusage or nugatory. *Wickens v Oakwood Healthcare System,* 453 Mich 60; 631 NW2d 690 (2001). Furthermore, "[w]hen the Legislature enacts laws, it is presumed to know the rules of statutory construction and therefore its use or omission of language is generally presumed to be intentional." *Carson City Hosp v Dept of Community Health*, 253 Mich App 444, 448, 656 NW2d 366, 368 (2002).

Statutory provisions must also be read in the context of the entire statute so as to produce a harmonious whole. *People v Lounsbery,* 246 Mich App 506, 633 NW2d 438 (2001). Thus, the Court must avoid a literal construction that produce an absurd result. *Cameron v Auto Club Ins Assn,* ___ Mich ___, 718 NW2d 784, 816-817, 2006 WL 2105988, *26, n17-n55 (2006) (Kelly, J, dissenting). Remedial statutes, such as the MCPA, must be liberally construed to achieve their intended goals and in favor of the intended beneficiaries. *Putkamer v Transamerica Ins Corp of America,* 454 Mich 626, 563 NW2d 683 (1997). In *Dix v American Banker's Life Assurance Company of Florida,* 419 Mich 410, 417; 415 NW2d 206 (1987), this Court stated the MCPA's remedial purpose:

> The Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons.

As Appellants point out in their Brief (p 2), there were over 18,000 new residential building permits issued in Michigan in 2005. Thus, large numbers of Michigan citizens are affected by acts, methods and practices of this State's licensed residential builders.[25]

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[25] Appellants' assertion in its Brief (p 2), that most warranty claims or disagreements are satisfactorily resolved is pure speculation and is belied by the number of appellate cases arising out of real estate transactions. Other equally plausible explanations for the allegedly low "permit to litigation" ratio are most people's general reluctance to litigate for both economic and social reasons,

## II. MICHIGAN'S LEGISLATURE INTENDED TO EXEMPT ONLY "A TRANSACTION OR CONDUCT SPECIFICALLY AUTHORIZED," AND NOT ENTIRE CLASSES OF DEFENDANTS.

### A. LEGISLATIVE INTENT

#### 1. Statutory Language.

The preamble to the MPCA states:

> AN ACT to prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties.

MCLA 445.901."Although a preamble is not to be considered authority for construing an act, it is useful for interpreting its purpose and scope." *Brown Plumbing and Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 187-188; 500 NW2d 733, 736 (1993). In this regard, "[o]ne of the most basic statutory construction rules requires words to be read in light of the general purpose sought to be accomplished by the statute." *Balough v City of Flat Rock*, 152 Mich App 517, 522; 394 NW2d 1, 3 (1986). See, also, *Huxtable v Bd of Trustees of Charter Twp of Meridian*, 102 Mich App 690, 694; 302 NW2d 282, 283-284 (1981) (relying on the meaning of words set forth in preamble in construing statute).

"Trade or commerce" is defined, in the Act, in pertinent part, as:

> ...the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

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as well as many persons' the lack of knowledge of their legal rights, particularly the fee-shifting provisions of the MCPA and other consumer protection legislation.

MCL 445.902(d). Under the Act,"trade or commerce" includes real estate transactions.[26]

Section 3 of the Act, MCL 445.903(a)-(gg), sets forth 33 definitions of "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce [that] are unlawful...."

Section 4 of the Act, MCL 445.904(1)-(3), contains the exemptions and §4(4) places the burden of proof on the "person claiming the exemption." The particular exemption at issue in this appeal, §4(1)(a), exempts "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

In interpreting the words of a statute, it is appropriate to consult dictionary meanings. *Stanton v City of Battle Creek*, 466 Mich 611, 617-618, 647 NW2d 508, 512 (2002). "Transaction" is defined in Black's Law Dictionary, as follows:

> **transaction,** *n.* **1.** The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. **2.** Something performed or carried out; a business agreement or exchange. **3.** Any activity involving two or more persons.

*Black's Law Dictionary* (8th Ed 2004), transaction. "Conduct" is defined, in pertinent part, as:

> **conduct,** *n.* Personal behavior, whether by action or inaction; the manner in which a person behaves. * * ***conduct,** *vb.* "The word 'conduct' ... covers both acts and omissions.... In cases in which a man is able to show that his conduct, whether in the form of action or of inaction, was involuntary, he must not be held liable for any harmful result produced by it ...." J.W. Cecil Turner, *Kenny's Outlines of Criminal Law* 13 n.2, 24 (16th ed. 1952).

*Black's Law Dictionary* (8th Ed 2004), conduct.

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[26] See, e.g., *Price v Long Realty,* 190 Mich App 470, 199 NW2d at 342 ("Trade or commerce includes the sale of real property under the act").

Where the legislature uses the word "or," it "generally refers to a choice or alternative between two or more things." *People v Neal*, 266 Mich App 654, 656, 702 NW2d 696, 698 (2005). Thus, the use of the word "or" in §4(1)(a) should be deemed to apply to *either* a transaction or conduct, and the Courts should be required to consider not just the "general transaction" but, also, the "conduct" involved in determining whether the violation alleged is "specifically authorized" by another regulatory body or statutory scheme.

Turning to the phrase "specifically authorized" and again consulting the dictionary, it becomes apparent that the "general" authority to engage in a particular business is not sufficient. The term "specific" is defined as:

> **specific**, *adj.* **1.** Of, relating to, or designating a particular or defined thing; explicit <specific duties>. **2.** Of or relating to a particular named thing <specific item>. **3.** Conformable to special requirements <specific performance>.

*Black's Law Dictionary* (8th Ed 2004), specific. The term "authorized" is defined as:

> **authorize**, *vb.* **1.** To give legal authority; to empower <he authorized the employee to act for him>. **2.** To formally approve; to sanction <the city authorized the construction protect>.

*Black's Law Dictionary* (8th Ed 2004), authorize.

As this Court has repeatedly admonished, every word in a statute should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare System,* 453 Mich 60; 631 NW2d 690 (2001). Further, words must be given their plain and ordinary meaning. *Robinson v City of Detroit,* 461 Mich 394, 402; 604 NW2d 300 (2000); *Hiltz v Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). Where words are unambiguous, the Court must refrain from further construction and must apply the words as written:

> Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402, 605 N.W.2d 300 (2000). If such language is unambiguous, as most such language is, *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 663 N.W.2d 447 (2003), "we presume that the Legislature intended the meaning clearly expressed-no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402, 605 N.W.2d 300.

*Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 281, 696 NW2d 646, 657 (2005). The Court is also constrained from "impos[ing] its own policy choices when interpreting a statute." *People v McIntire*, 461 Mich 147, 152, 599 NW2d 102 (1999).

There is nothing ambiguous about the words a "transaction *or* conduct," or the phrase "specifically authorized." To the extent that the lower courts have been reading the "general transaction" language in *Smith* as authority to disregard the discrete transaction or conduct at issue, or to equate "regulated" with "specifically authorized," this approach is at odds with the plain language of the statute. This approach would also require ignoring this Court's holding in *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617, 317 NW2d 805, 811 (1982), despite this Court's recognition in *Smith* that *Diamond* remained controlling authority with respect to interpreting §4(1)(a).[27] As Justice Cavanagh explained in his dissent in *Smith*, the "general transaction" approach would leave the MCPA virtually unenforceable:

> Furthermore, I question whether the insurance commissioner's silence may be construed as a "specific authorization" under subsection 4(1)(a). Defendant would have us hold that conduct generally or implicitly allowed is exempt. Such a broad interpretation of such narrow language would result in all MCPA claims being barred. Businesses are generally allowed to transact business. The MCPA protects consumers from the unfair transaction of business.[28]

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[27] *Smith*, 460 Mich at 463, 597 NW2d at 37.

[28] *Smith*, 460 Mich at 475-476, 597 NW2d at 43.

Indeed, given the plain dictionary meaning of "specifically authorized," the inquiry cannot turn on whether the conduct or transaction is "generally" within a regulated entity's business activities.[29] Rather, as Justice Cavanagh opined, the focus must be on whether the regulatory body or statutory scheme has addressed the particular practice at issue and, if so, whether it has declared the practice to be lawful:

> Confusion in analyzing MCPA claims has resulted from: construing the exemptions too broadly, rendering the vast majority of private suits exempt under subsection 4(1)(a), construing the exemptions too narrowly so as to remove all exemptions, or construing the transaction or conduct at issue overly broad or narrow, rendering the MCPA or its exemptions meaningless. It is my opinion that *a proper inquiry should be first to determine whether the specific transaction or conduct at issue, as opposed to the general transaction, is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state...." MCL 445.904(1)(a); MSA 19.418(4)(1)(a). The next inquiry should characterize the party filing suit and the act or practice at issue to determine whether the act should apply to the method, act, or practice.*[30]

As will be discussed in the next section, courts across the country construing UDAP statutes containing the same or similar "specifically authorized" exemptions have applied the analysis suggested by Justice Cavanagh. Plaintiffs respectfully urge that Justice Cavanagh's approach, which gives meaning to all of the words of the exemption, is most consistent with the overall goal of the statute – to protect consumers from unconscionable, unfair or deceptive methods, acts or practices in trade or commerce.

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[29] See, e.g., *Vogt v Seattle-First National Bank*, 117 Wash 2d 541, 552, 817 P2d 1364 (1991) (mere acquiescence by regulatory body is not specific authorization for a particular practice).

[30] *Smith*, 460 Mich at 475-476, 597 NW2d at 43 (Cavanagh, J, dissenting) (footnotes omitted; italics added).

### 2. Background of the MCPA and the "Specifically Authorized" Exemption.

The MCPA was authored in large part by Edwin M. Bladen, who was an Assistant Attorney General from 1965 to 1986 and was in charge of the Consumer Protection and Economic Crime Division from 1970-1976. See, Bladen, *How and Why the Consumer Protection Act Came to Be.* [31] After leaving the Attorney General's office, Mr. Bladen became a Federal Administrative Law Judge.[32] Perhaps largely in response to the upheaval caused by *Smith v Globe Life*, Mr. Bladen wrote the cited article, where he discusses at length the history and intent of the MCPA, and why *Smith* threatens to foil the legislative intent.

Mr. Bladen begins by informing us that the legislature meant to enlarge the remedies for unfair or deceptive acts and practices by doing away with the element of intent and looking to FTC decisions for guidance.[33] "We intended that the exemptions be very limited and the act to be broadly construed to remedy consumer wrongs simply because it was in derogation of common law fraud and deceit," and placed "the burden of claim and proving an exemption is on the person claiming it."[34] Mr. Bladen further notes that the enumerated unfair and deceptive practices set forth in MCL 445.903, were derived in large part from the Ohio Sales Practices Act,[35] and recommends that the

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[31] http:www.michbar.org/consumer/pdfs.HowWhy.pdf, p 1, n 2 (copy attached in Appellees' Appendix, p 80b.

[32] *Id.*

[33] *How and Why*, p 10.

[34] *Id.*, p 13, citing what is now MCL 445.904(4).

[35] Ohio Revised Code, §1345.12(A).

practitioner consult cases decided under that Act.[36]

With respect to the exemption contained in §4(1)(a) of the MCPA, Mr. Bladen writes that the legislative intent was to focus on the nature of the act or practice in question, rather than the person or entity involved:

> For example, the use of the word "a transaction" in subsection 4(1)(a) is singular in nature. Our intent was to exempt those specific statutorily authorized transactions which the legislature had already permitted.
>
> I personally wrote those words and chose the word 'a' to emphasize the singular nature of the transaction to keep with the overall thrust of the act's view that we look to see, *not whether the entity is subject to the act, but whether the method, act or practice alleged to violate the act is indeed one addressed and prohibited by the act.*
>
> To the extent *Smith v Globe Life Insurance*, 460 Mich 446, 597 NW2d 28 (1999) arrived at a different view, it is clearly erroneous and totally illogical given the other exemption sections and investigative coverages in the act.[37]

Mr. Bladen then went on to discuss the specifics of why *Smith*, to the extent it intended to exempt any defendant who could "point to the legal fact it is regulated by law," was wrongly decided.[38] By way of example, he cites MCL 445.917 through 445.921, which authorizes various state regulatory agencies to conduct investigations under the MCPA and, where warranted, refer the matters back to the Attorney General's office for prosecution. "If the theme act was to exempt these regulated entities as the court says in *Smith v Globe Life Insurance* [citation omitted], it is a totally absurd result to permit their investigation under the act and reference to the Attorney General for enforcement action under the Act if the Act was inapplicable in the first place."[39] Mr. Bladen

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[36] *How and Why*, p 15. See, *Elder* (Apx 47b) as an example of a case decided under the Ohio statute.

[37] *How and Why*, p 12 (emphasis added).

[38] *Id.*, p 16.

[39] *Id.*, p 17.

concludes by explaining how the legislature intended the MCPA to be construed:

> In sum, the entire theme of the Consumer Protection Act was to determine whether the method, act or practice, or the transaction or conduct was prohibited by the act. *All persons regardless of their form or regulatory status were intended to be covered under the act.* Section 4(1)(a)'s exemption for "'a' specifically permitted transaction or conduct" was to be ascertained by reference to the regulatory law which the defendant claimed allowed the particular transaction or occurrence. If that law permitted it, then the transaction or conduct was exempted from the act. If it did not, then the transaction or conduct at issue was addressed by the act and if it fell within one o more of the defined prohibited methods, acts or practices, then there was liability under the act. *The exemption applies only [where] the particular transaction or conduct being challenged is specifically permitted by the regulatory statute governing the defendant. The exemption was never intended to determine who was subject to the act, only what transaction or conduct was subject. Smith v Globe Life Insurance Company* unfortunately turned the exemption on its head.
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> Hopefully an avenue to overturn the Court's decision in *Smith v Globe Life Insurance* arrives soon. If not legislation will be necessary to correct the enormous and unnecessary grievance the Court has caused to Michigan's consumers and businesses who expect fair competition in the marketplace.[40]

While an article written by the author of legislation is certainly enlightening, Appellees understand that it is not binding on the Court. There is, however, ample support for Mr. Bladen's views found in numerous court opinions construing similar statutes and the "specifically authorized" exemption.

It is now universally established that UDAP statutes, including the MCPA, are remedial in nature.[41] As such, the MCPA provisions are to be broadly construed in favor of coverage, and any exemptions narrowly construed.[42] In construing the "specifically authorized" or "specifically

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[40] *How and Why*, p 17.

[41] See, e.g., *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 97-98, 537 NW2d 471, 473 (1995).

[42] *Smith v Michigan Employment Sec Comm*, 410 Mich 231, 278, 301 NW2d 285, 300 (1981) (remedial statutes are to be liberally construed and exemptions narrowly interpreted).

permitted" type of exemption, it is useful to look to the purpose of such an exemption:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree [citing Motor Vehicle Sales Licenses Act, Real Estate Broker License Act and Time-Share Act]. The defendants' interpretation of the exemption would deprive consumers of a meaningful remedy in many situations.

*Skinner v Steele*, 730 SW2d 335, 337 (Tenn App 1987).[43] Thus, Courts considering "specifically authorized" exemptions have stated that the exemption must be applied only where "a direct and unavoidable conflict exists between the application of the [MCPA] and application of the other regulatory scheme or schemes."[44] That is, the court "must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes." *Elder v Fischer*, 129 Ohio App 3d 209, 219, 717 NE2d 730, 737 (1998), quoting the leading case of *Lemelledo v Beneficial Mgt Corp of America*, 150 NJ 255, 270, 696 A2d 546, 554 (1997).

Additionally, Courts impose the requirement that a defendant point to specific statutory or regulatory provision authorizing the conduct at issue:

> Because exemptions to the CPA must be narrowly construed..., in order to fall within this exemption, the particular practice found to be unfair or deceptive must be

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[43] See, also, *Showpiece Homes Corp v Assurance Co of America*, 38 P3d 47, 56 (Colo S Ct 2001) (citing *Skinner*).

[44] *Elder v Fischer*, 129 Ohio App 3d 209, 219, 717 NE2d 730, 737 (1998) (interpreting Ohio statute), quoting *Lemelledo v Beneficial Mgt Corp of America*, 150 NJ 255, 270, 696 A2d 546, 554 (1997) (interpreting New Jersey statute).

> specifically permitted.... An action or transaction is not exempt merely because it is regulated generally, ... or merely because a regulating agency acquiesces in it,.... Rather, the agency must take "overt affirmative actions specifically to permit the actions or transactions engaged in by the person or entity involved in a Consumer Protection Act Complaint."

*Edmonds v John L Scott Real Estate, Inc*, 87 Wash App 834, 844, 942 P2d 1072, 1077-1078 (1997).

Here, Appellants have not pointed to an affirmative effort by any regulatory agency to specifically authorize the conduct challenged by the Plaintiffs. Appellants have also failed to demonstrate a "direct and unavoidable conflict" between the MCPA and the OC.

### B. EXAMPLES OF "DIRECT AND UNAVOIDABLE CONFLICT"

In *Attorney General v Diamond Mortgage*, the defendant argued that the "specifically authorized" exemption would become meaningless because no statute "specifically authorizes misrepresentations or false promises."[45] Since then, however, a number of cases have surfaced illustrating this Court's wisdom in focusing on the particular transaction or conduct at issue, rather than simply on whether the defendant is subject to regulation.

One example, cited by Appellants, is *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 683 NW2d 200 (2004). There, the consumers claimed an MCPA violation arising out of allegedly deceptive programming of slot machines that had been previously approved by the Michigan Gaming Control Board. The Court found §4(1)(a) exempted the claim from the MCPA. In reaching its conclusion, the Court cited the Michigan Gaming Control and Revenue Act, MCL 432.203(3), which "includes the following provision: 'Any other law that is inconsistent with this act does not apply to casino gaming as provided for by this act.'"[46] Thus, the Court concluded that the MGCRA preempted

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[45] *Diamond*, 414 Mich at 617, 327 NW2d at 811.

[46] *Kraft*, 261 Mich App at 547, 683 NW2d at 207.

any other statutory or common law claims arising out of casino gaming.

More importantly, however, the *Kraft* Court also looked to the MGCRA provisions granting the Michigan Gaming Control Board exclusive authority to adopt standards for licensing electronic gambling devices. The Court further noted that the MGCB puts gaming devices through rigorous testing and ensures that the game rules are clearly displayed and are not confusing or misleading.[47] It was undisputed in *Kraft* that the MGCB had "specifically authorized defendants to operate the slot machines at issue in this case."[48] Consistent with an "unavoidable conflict" analysis, the Court held that "[o]nce the MGCB has inspected and approved a casino game, the manufacturers and casinos should be able to rely on the MGCB's determination that the game was appropriate for the gaming public."[49]

Another example is found in *Osman v Ford Motor Co*, 359 Ill App 3d 367, 833 NE2d 1011 (2005), a claim brought under the Illinois Business Practices Act alleging that Ford had provided inadequate warnings and concealed material facts concerning the dangers of using passive-restraint systems without using the manual lap belt. Like the MCPA, the IBPA contains an exemption for "'[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.' 815 ILCS 505/10b(1)."[50] The Court therefore found the complained of conduct exempt, inasmuch as the particular restraint system at issue complied with Federal Motor Vehicle Safety Standard 208 and was, therefore,

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[47] See, MCL 432.204a(1)(c).

[48] *Kraft*, 261 Mich App at 542, 683 NW2d at 205.

[49] *Kraft*, 261 Mich App at 551, 683 NW2d at 209.

[50] *Osman*, 359 Ill App at 381, 833 NE2d at 1022.

"specifically authorized."[51]

In *Bober v Glaxo Wellcome, PLC*, 246 F3d 934 (7th Cir 2001), the consumer complained that the defendant violated the IBPA by supplying misleading information concerning whether two Zantac 75 tablets (an over-the-counter drug) could be substituted for one Zantac 150 tablet (a prescription medication). Even though the proposed substitution would have contained the same amount of active ingredient, the defendant informed plaintiff that the substitution could only be made on the advice of his physician. The Court found the claim was preempted by the Food, Drug and Cosmetic Act, 12 USC 321, *et seq*, which prohibits a manufacturer of a drug from "recommend[ing] or even suggest[ing] uses for a drug that are not approved by the FDA."[52] The Court noted that, "[t]his was a fine line to walk...Glaxo was required by federal law to say a certain amount and simultaneously required not to say too much."[53] The Court concluded, ". . .under the circumstances what it chose to say and not to say was a sufficiently careful compromise to fall within what is specifically authorized by federal law."[54]

In reaching its conclusion, the *Bober* Court considered "two key decisions" from the Illinois Supreme Court, *Weatherman*, 186 Ill 2d 472, 239 Ill Dec 12, 713 NE2d 543, and *Martin*, 163 Ill2d 33, 205 Ill Dec 443, 643 NE2d 734.[55] In *Weatherman*, the Illinois Supreme Court held that disclosures that complied with RESPA were exempt while, in *Martin*, the Court held that, despite

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[51] *Id.*, 359 Ill App at 381, 833 NE2d at 1022.

[52] *Id.*, 246 F3d at 942.

[53] *Id.*, 246 F3d at 942.

[54] *Id.*, 246 F3d at 942.

[55] *Id.*, 246 F3d at 940.

technical compliance with disclosure requirements imposed by the Commodities Futures Trading Commission, the document was misleading and not exempt. The *Bober* Court reconciled the two holdings, explaining:

> Taken together, the cases stand for the proposition that the state CFA will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations. If the parties are doing something *specifically authorized* by federal law, section 10b(1) will protect them from liability under the CFA. On the other hand, the CFA exemption is not available for statements that manage to be in technical compliance with federal regulations, but which are so misleading or deceptive in context that federal law itself might not regard them as adequate.[56]

The *Bober* opinion is particularly instructive in that it highlights the proposition that even highly regulated industries (drug manufacturers) are subject to scrutiny under UDAP statutes but, a UDAP's "specifically authorized" exemption will apply where the conduct complained of has been specifically approved or is specifically required by another statute or regulation. This analysis is consistent with Mr. Bladen's pronouncement that Michigan's legislature intended the MCPA to focus on the particular conduct or transaction at issue, rather than the industry involved, in determining whether the "specifically authorized" exemption would apply.[57]

As the foregoing cases illustrate, any fear that §4(1)(a) will become meaningless without a blanket exemption for regulated industries is unfounded. Rather, as these cases show, the correct application of the "specifically authorized" exemption furthers the remedial mandate to construe the MCPA broadly and its exemptions narrowly.

As will be discussed in the next section, *Kraft,* and the other cases cited in this section, are easily distinguishable from the case at bar, in that: (1) the regulation at issue, i.e., the Occupational

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[56] *Bober*, 246 F3d at p 941.

[57] *How and Why*, p 12.

Code does not provide for exclusive remedies or regulation; and (2) the particular transaction or conduct at issue is not "specifically authorized" by any regulation or statute.

## III. SECTION 4(1)(a) OF THE MICHIGAN CONSUMER PROTECTION ACT DOES NOT CREATE A WHOLESALE EXEMPTION FOR LICENSED RESIDENTIAL BUILDERS.

### A. INTRODUCTION

Michigan's Occupational Code, MCL 339.601(1) requires residential builders to be licensed. Although Appellants concede that consumers have a private right of action to bring contract claims in Court,[58] Appellants nevertheless argue that the Occupational Code fully regulates builders' conduct, thereby exempting them from the MCPA under §4(1)(a). As will be demonstrated in this section, Appellants confuse "regulated" with "specifically authorized."

### B. THE OCCUPATIONAL CODE DOES NOT PREEMPT OR EXCLUDE OTHER CAUSES OF ACTION.

The Appellants mischaracterize the Occupational Code as being a statute that so pervasively regulates residential builders as to preempt other remedies.[59] In *Attorney General v Diamond, supra*, this Court rejected the argument that the Occupational Code provided a "pervasive regulatory scheme that might be thrown out of balance by initial review in the courts."[60] This Court went on to state:

> The Department of Licensing and Regulation, under [MCL 339.101, *et seq*], was given responsibility to determine, under the statutory guidelines, to whom a license should be granted and whose license should be taken or suspended. The agency was

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[58] Appellants' Brief, p 2.

[59] Such an interpretation is belied by the Building Contract Fund Statute, MCL 570.151, *et seq*, and Appellants' own concession that these disputes may be brought as contract claims (Appellants' Brief, p 2).

[60] *Id.*, 414 Mich at 614, 327 NW2d at 810.

> not granted broad powers of regulation over the entire subject matter of a licensee's business.
>
> Thus, without interfering with the responsibilities of the Department of Licensing and Regulation, the courts of this state can determine what the obligations of real estate brokers are under our consumer protection, usury, and corporation laws. Uniformity of action between the agency and the courts is simply not a concern because there is no need for the responsibilities of a licensee under the licensing statutes to be the same as its responsibilities under the usury or consumer protection laws.[61]

Support for this Court's holding is found in both the MCPA and the OC, as both statutes contain a "savings clause" reserving consumers' rights to pursue multiple avenues for relief. MCL 445.916, provides that the MCPA "shall not affect any other cause of action which is available." Similarly, the OC, at MCL 339.601(9), provides that "[t]he remedies under this section are independent and cumulative. The use of 1 remedy by a person shall not bar the use of other lawful remedies by that person or the use of a lawful remedy by another person."

Ordinarily, where two remedial statutes relate to the same subject matter, an aggrieved party may pursue both avenues of relief. See, e.g., *Faulkner v Flowers*, 206 Mich App 562, 569, 522 NW2d 700, 703 (1994). There, as here, the plaintiff had initiated an administrative proceeding under the wage and fringe benefits act, as well as a circuit court action under Michigan's Whistleblower Protection Act. The Court found the pursuit of both remedies proper:

> We hold that the Legislature has provided overlapping remedies for an employee whose employment is terminated for reporting wage and fringe benefits violations. We find it within the legislative intent for a plaintiff to pursue a WPA cause of action even though that plaintiff has already initiated a wage and fringe benefits act administrative proceeding. The WPA provides remedies not available in the wage and fringe benefits act, *cf.* MCL 408.483(2) with MCL 15.364; *see also Tyrna* [*v Adamo, Inc,* 159 Mich App 592, 407 NW2d 47 (1987)] at 600. There are no conflicts between the remedies provided, and the goals of the two statutes are complementary.

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[61] *Id.*, 414 Mich at 614-625, 327 NW2d at 810.

Another example of statutes complementary with the OC is the Federal Fair Debt Collection Practices Act, 15 USC 1692, *et seq*, and the Michigan Collection Practices Act, MCL 445.251, *et seq*. Although the OC also covers debt collectors and debt collection practices, MCL 339.915-339.918, no court has held the state or federal statutes preempted by the OC or that such practices are exempt from the MCPA.

There is simply no authority – and Appellants failed to cite any – for the proposition that the Occupational Code is intended to preempt any other remedies available to consumers who are adversely affected by unfair or deceptive methods, acts or practices engaged in by residential builders.

### C. MERE PROOF THAT AN ENTITY IS LICENSED OR REGULATED IS NOT SUFFICIENT TO PROVE AN EXEMPTION UNDER §4(1)(A).

MCL 445.904(4) places the burden of proving an exemption on Appellants. The fact that the Appellants may be licensed or otherwise regulated under the Occupational Code is insufficient to meet that burden.

In fact, it is patently obvious that our legislature knows how to exempt an entire regulatory scheme from the MCPA when it wishes to do so. See, e.g., MCL 445.904(3), which provides that the MCPA "does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093."[62] Interesting to note is that the legislature chose not to exempt insurance companies, per se, but rather, to exempt certain methods, acts or practices subject to the insurance code. The legislature's focus on the methods, acts or practices, rather than the industry at

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[62] This exemption was added by 2000 PA 432, not long after this Court's decision in *Smith v Globe Life, supra.*

large, is further indication that it did not intend the MCPA to exempt particular industries not enumerated in the statute.[63]

Indeed, the "regulated industry" argument urged by Appellants has been considered and rejected by a number of other courts in the context of "specifically authorized" exemptions nearly identical to §4(1)(a) of the MCPA. In *Elder v Fischer*, 129 Ohio App 3d 209, 717 NE2d 730 (1998), a residential-care facility sought to take advantage of the Ohio Consumer Sales Practices Act's "specifically authorized" exemption, arguing that "health-care providers are subject to specific legislation and are comprehensively regulated."[64] The Court rejected defendant's argument, finding that regulated industries are not automatically excluded from the CSPA:

> Further, even if we were to determine that the legislature's intent was not clear from the language of the CSPA, we are not willing to hold that the regulation of an industry automatically removes it from the statute's application. *This is 'because occupations with high potentials for consumer fraud are commonly licensed,* including debt collectors, vocational schools, funeral directors, automobile and mobile home sellers, *nursing home owners*, employment agencies, television repairmen, auto repairmen, plumbers, electricians, appliance repairmen, and optometrists.' [fn 25, Roberts & Martz, Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions: The Ohio Consumer Sales Practices Act (1981), 42 Ohio St L J 927, 959] (Emphasis added.).[65]

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[63] An interesting example of an insurance company being held subject to a UDAP statute, despite a similar exemption for practices made unlawful under the insurance code is *Conatzer v American Mercury Ins Co, Inc*, 13 P3d 1252 (Ok App 2000). There, the Court found that the conduct at issue was the unlawful failure of the insurance company to obtain a salvage title after acquiring an insured's vehicle pursuant to the payment of a total loss claim. As noted by the Court, the alleged conduct violated that state's motor vehicle code, not the insurance code, and was therefore outside the exemption.

[64] *Elder*, 129 Ohio App 3d at 211, 717 NE2d 730, at 732.

[65] *Elder*, 129 Ohio App 3d at 217, 717 NE2d at 737 (emphasis added).

The *Elder* Court relied extensively on the reasoning of the New Jersey Supreme Court in the leading case of *Lemelledo v Beneficial Mgt Corp of America*, 150 NJ 255, 696 A2d at 554 (1997).[66] Both the *Elder* and *Lemelledo* Courts recognized the danger inherent in providing a wholesale exemption for regulated industries:

> "When remedial power is concentrated in one agency, underenforcement may result because of lack of resources, concentration on other agency responsibilities, lack of expertise, agency capture by regulated parties, or a particular ideological ent by agency decisionmakers. See, e.g., *Arcadia v Ohio Power Co*, 498 US 73, 87-88, 111 S Ct 415, 423-24, 112 L Ed 2d 374, 388-89 (1990) (Stevens, J, concurring) *** Underenforcement by an administrative agency may be even more likely where, as in this case, the regulated party is a relatively powerful business entity while the class protected by the regulation tends to consist of low-income persons with scant resources, lack of knowledge about their rights, inexperience in the regulated area, and insufficient understanding of the prohibited practices. *The primary risk of underenforcement - the victimization of a protected class - can be greatly reduced by allocating enforcement responsibilities among various agencies and among members of the consumer public in the forms of judicial and administrative proceedings and private causes of action.*"[67]

The adverse impact of a wholesale exemption for regulated industries on UDAP statutory enforcement was also discussed by the Washington Supreme Court in *Vogt v Seattle-First National Bank*, 117 Wash 2d 541, 552, 817 P2d 1364, 1370 (1991). There, the Court rejected the argument that heavy regulation of banks or even the regulatory agency's apparent acquiescence in the practice under consideration was tantamount to specific authorization or permission:

> Overly broad construction of "permission" may conflict with the legislature's intent that the Consumer Protection Act be liberally construed so that its beneficial purposes may be served.-"Liberal construction" is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined.

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[66] A Westlaw search conducted September 17, 2006, revealed 56 state and federal opinions citing *Lemelledo* with approval.

[67] *Elder*, 129 Ohio App 3d at 218, 717 NE2d at 737, citing *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554 (emphasis added).

Indeed, our appellate courts have recognized the need for tools, such as statutory damages and fee-shifting provisions, to enhance the likelihood of private enforcement of remedial statutes, including the MCPA.[68] As the Court continued in *Elder*, again quoting *Lemelledo*:

> "We are loathe to undermine the CFA's enforcement structure, which specifically contemplates cumulative remedies and private attorneys general, by carving out exemptions for each allegedly fraudulent practice that may concomitantly be regulated by another source of law. The presumption that the CFA applies to covered practices, even in the face of other existing sources of regulation, preserves the Legislature's determination to effect a broad delegation of enforcement authority to combat consumer fraud."[69]

Like the CSPA and the CFA considered in *Elder* and *Lemelledo*, the MCPA contains a number of hallmarks recognized by courts across the country as being indicative of a legislative intent that the MCPA be cumulative with other remedies. Specially, the MCPA authorizes actions by both the Attorney General (§10), and private parties (§11), to seek redress for unfair or deceptive practices made unlawful under §3 or by the Federal Trade Commission Act, 45 USC 45(a)(1) and 45 USC 45(g).[70]

The MCPA also sets forth a broad enforcement scheme, coordinating the efforts of the private sector, the attorney general, and various regulatory departments. For example, MCL 445.912(1) requires that when an action is commenced under §11 or §15, "the clerk of the court shall mail a copy

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[68] See, e.g., *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 98, 537 NW2d 471, 474 (1995) (failure to award reasonable attorney fees would thwart the remedial purpose of the statute); see, also, *Schellenberg v Rochester Michigan Lodge No 2225*, 228 Mich App 20, 56, 577 NW2d 163, 179 (1998) (recognizing the need, in civil rights action, to allow enhancement of attorney fees in order to attract competent counsel).

[69] *Elder*, 129 Ohio App 3d at 218, 717 NE2d at 737, citing *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554.

[70] See, e.g., *Lemelledo*, 150 NJ at 553, 717 NE2d at 268-269.

of the complaint to the attorney general, and upon entry of a judgment or decree in the action, the clerk of the court shall mail a copy of the judgment, decree, or order to the attorney general."

Additionally, the MCPA authorizes regulatory agencies to investigate methods, acts or practices violating the MCPA and mandates a full report to the attorney general upon completion of the investigation.[71]

Of particular note §11(3) of the Act, which specifically authorizes class actions and allows redress not only for conduct made unlawful under §3 but, also, conduct previously declared unlawful and "either reported officially or made available for public dissemination pursuant to section 9 ," as conduct deemed by the "circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the federal trade commission act, 15 USC 45(a)(1)...." MCL 445.911(3)(a)-(c).

This combination of provisions, intertwining private, attorney general and regulatory enforcement and which encompasses acts or practices deemed unlawful by the FTC, establishes an enforcement scheme that would be frustrated by allowing an automatic exemption for entities licensed or regulated under other statutes.

The foregoing provisions of the MCPA "effect a broad delegation of enforcement authority to combat consumer fraud."[72] Adopting Appellants' proposed construction, which would limit

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[71] MCL 445.917 (Commissioner of Financial Institutions); MCL 445.418 (Public Service Commission); MCL 445.419 (Cemetery Commission); MCL 445.920 (Department of Commerce); MCL 445.921 (Commissioner of Insurance).

[72] *Elder*, 129 Ohio App 3d at 218, 717 NE2d at 737; *Lemelledo*, 150 NJ at 269-270, 696 A2d at 553-554.

enforcement to the residential builders' and maintenance and alteration contracts' board,[73] would seriously undermine the MCPA's enforcement structure.

Moreover, Appellants' "Chicken Little" argument, i.e., that "every dissatisfied homeowner will 'up the ante' with a potential award of actual attorney fees"[74] is not well taken. As the Court of Appeals recognized in *Jordan,* the fee-shifting provision of the MCPA, which provides for "reasonable" as opposed to "actual" fees,[75] serves an important remedial purpose.[76] It is also well-established that courts must consider a number of factors in determining a reasonable fee, not the least of which is the degree of success obtained by the consumer.[77] Finally, there is nothing untoward about "upping the ante" when it comes to deterring unfair or deceptive practices.[78]

Given the legislature's intent to provide broad coverage and narrow exemptions, Appellees respectfully urge that this Court embrace the test set forth in *Lemelledo, supra,* and adopted in *Elder, supra*:

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[73] MCL 339.2402.

[74] Appellants' Brief, p 18.

[75] MCL 445.911(2).

[76] *Jordan v Transnational Motors*, 212 Mich App at 98-99, 537 NW2d at 473-474.

[77] As the *Jordan* Court cautioned, its ruling does not require courts to "rubber-stamp" a plaintiff attorney's fee invoice:

> By our holding, we do not mean to suggest that a court must, in a consumer protection case, award the full amount of a plaintiff's requested fees. Rather, we hold that after considering all of the usual factors, a court must also consider the special circumstances presented in this type of case.

*Id.*, 212 Mich App at 99, 537 NW2d at 474.

[78] See, e.g., *National Wildlife Federation v Consumers Power Co*, 729 F Supp 62, 64 (WD Mich 1989) (discussing congressional motivation for fee-shifting provisions includes encouraging plaintiffs to vindicate important policies and deterring violations by defendants).

> . . . in order to overcome the presumption that the [MCPA] applies to a covered activity, a court must be convinced that "a direct and unavoidable conflict exists between the application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes."[79]

Application of the foregoing test is also consistent with the legislature's intent to allow aggrieved parties to simultaneously pursue remedies under available complementary statutes and regulations. Here, it is concurrent application of the MCPA and OC do not subject residential builders to "a direct and unavoidable conflict." As Appellants point out, many of the MCPA and OC prohibitions overlap (Appellants' Brief, p 8). Thus, by definition, the statutes do not work at "cross-purposes" and there is no need to exempt residential builders from coverage under the MCPA. Indeed, to do so would potentially leave thousands of Michigan consumers without adequate redress should they be victimized by unfair or deceptive conduct at the hands of a licensed residential builder. The enormity of such a catastrophe becomes readily apparent when one considers that, for most Michigan consumers, their home is their single largest and most important investment.

## III. DEFENDANT HAS FAILED TO MEET ITS BURDEN OF PROVING THAT ITS CONDUCT IS EXEMPTED FROM THE MICHIGAN CONSUMER PROTECTION ACT.

MCL 445.904(4) places the burden of proving a claimed exemption on the Appellants. Under the "specifically authorized" exemption contained in §4(1)(a), Appellants are required to prove more than mere licensure or regulation.[80]

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[79] *Elder,* 129 Ohio App 3d at 219, 717 NE2d at 737, quoting *Lemelledo*, at 150 NJ at 270, 696 A2d at 554.

[80] See, e.g., *Lavine v First National Bank of Commerce*, 917 So2d 1235, 1241 (La App 5th Cir 2005) (exemption did not apply where defendant failed to show specific federal legislation or an

In the recent case of *Wong v T-Mobile USA, Inc*, 2006 WL 2042512 (ED Mich 2006), Judge Nancy G. Edmunds, was called upon to examine §4(1)(a), in the context of an alleged overcharge by a cellular phone company. While cellular phone companies are extensively regulated by the Federal Communications Act, 47 USC 151, *et seq*, the Court noted that not every aspect of the provision of wireless services is regulated. The Court framed the issue as follows:

> In truth, several general transactions take place under the umbrella of providing cellular services, but this case concerns only one: billing. Plaintiff alleges that Defendant double-billed him for a service he had already paid for. The Court must therefore determine whether Defendant's billing practices are "specifically authorized."[81]
>
> * * *
>
> Although this case is tangentially related to Defendant's rates, and state regulation of rates is preempted, 47 U.S.C. § 332(c)(3)(A), Plaintiff does not contest those rates generally. Rather, Plaintiff contends that Defendant double-billed him for a service he had already paid for. Thus, as described above, this is a dispute over Defendant's billing practices, an area over which the FCC has expressly arrogated to the states through laws such as the MCPA.[82]

The Court, relying on *Diamond Mortgage* and *Baker v Arbor Drugs,* concluded that "[t]he 'general transaction' at issue here [billing] was not 'specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.' Mich. Comp. Laws § 445.904(1)(a); Smith, 597 N.W.2d at 38. Therefore, Defendant's alleged misconduct is not exempt from the MCPA."

Here, among the "general transactions" at issue are Appellants' misrepresentations regarding experience and qualifications, the financing of the construction mortgage, and the failure to honor

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opinion by state regulators that the challenged conduct was "specifically authorized").

[81] *Id.*, 2006 WL 2042512, *8.

[82] *Id.*, at *9.

a personal guaranty of performance under the contract. Appellant has failed to point to any authority for the proposition that any of these transactions are "specifically authorized" by virtue of Appellants' license or the OC.

On the remaining transactions, to-wit: misrepresenting the characteristics, uses and benefits of the residence; misrepresenting the standard, quality, and grade of the residence, failing to complete the construction of the residence; and making material misrepresentations and/or failing to advise of material information with respect to the transaction reflected in the Agreement,[83] nothing in the OC "specifically authorizes" these transactions.[84] In fact, these transactions are specifically *prohibited.* See, MCL 339.2411(2)(a), (d), (m).

Even post-*Smith*, our courts have been consistent in holding that a transaction or conduct that is actually *prohibited* under another statute or regulation, may constitute a per se violation of the MCPA. See, e.g., *Lozada v Dale Baker Oldsmobile, Inc,* 197 FRD 321, 340-341 (WD Mich 2000) (granting summary judgment on MCPA claim after finding violation of Motor Vehicle Finance Act). Similarly, in *Nelson v Associates Financial Services of Indiana*, 253 Mich App 580, 659 NW2d 635 (2002), *lv den*, 468 Mich 896, 661 NW2d 238 (Table) (2003), the Court held that where a statute or regulatory scheme actually *prohibits* certain conduct, a violation of the MCPA may be premised on conduct that violates the other statute or regulatory scheme.

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[83] Second Amended Complaint, ¶ 34 (Apx 49a).

[84] See, e.g., *Vogt v Seattle-First National Bank*, 117 Wash 2d 541, 552, 817 P2d 1364 (1991) ("specifically authorized" means that "an agency must take 'overt affirmative actions specifically to permit the actions or transactions engaged in' by the person or entity involved in a Consumer Protection Act complaint").

In *Nelson*, the plaintiff had based his claim under the MCPA on the defendant financial institution's violation of a statute which prohibited mortgage companies from assessing unlawful charges. MCLA 438.31c(2)(c). The mortgage company attempted to advance the same argument Appellants assert here, i.e., that because mortgage companies are regulated by the Michigan Financial Institutions Bureau and are subject to an extensively regulatory scheme, it was exempt from the MCPA. The *Nelson* Court disagreed, holding:

> We conclude that the trial court correctly determined that count IV of plaintiff Galaske's amended complaint states a claim upon which relief may be granted because it alleges a violation of the MCPA, M.C.L. § 445.901 *et seq.*, premised upon violation of M.C.L. § 438.31c(2)(c).
>
> Section (3) of the MCPA, M.C.L. §445.903, declares unlawful, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Plaintiff Galaske alleges that defendant's prepayment penalties in excess of those authorized by M.C.L. § 438.31c(2)(c) meet the definitions of such practices found in subsections (n), (t), and (z) of MCL §445.903(1) . . . .
>
> A private person may bring an action for declaratory relief, injunctive relief, and actual damages or $250, whichever is greater, under section 11 of the MCPA, M.C.L. § 445.911. See also *Smith v. Globe Life Ins Co,* 460 Mich. 446, 449, 468; 597 NW2d 28 (1999), which held that a private person may bring an action under the MCPA for alleged violation of the Insurance Code. Also, this Court has approved actions under the MCPA where it was alleged that the defendants induced borrowers to create sham corporations for the purpose of evading usury limitations. *Rutter v. Troy Mortgage Servicing Co,* 145 Mich.App 116, 120, 124-125; 377 NW2d 846 (1985); *Allan v. M & S Mortgage Co,* 138 Mich.App 28, 42-43; 359 NW2d 238 (1984).[85]

Second, as set forth previously, in *Smith,* this Court acknowledged that *Attorney General v Diamond Mortgage*, remained controlling authority. Appellants' argument that it can violate the MCPA with impunity was soundly rejected in *Diamond Mortgage*:

> We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan

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[85] *Nelson*, 253 Mich App at 598-599, 659 NW2d at 645.

> Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exception of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exception will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States". For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business.

*Id.*, 414 Mich at 617, 327 NW2d at 811.

By definition, a transaction or conduct that is actually prohibited by law cannot be deemed "specifically authorized." Further, as discussed above, there is no inconsistency or conflict between the methods, acts or practices deemed unlawful under the OC and the methods, acts or practices deemed unlawful under the MCPA. Unlike the defendants in *Kraft*, *Bober,* and *Osman*, discussed in Section II-B, *supra*, the Appellants in this case have failed to cite any facts or authority that would prove its claimed exemption under §4(1)(a). Appellants have therefore failed to meet their burden of proof under §4(4).

## CONCLUSION

This case presents the Court with an opportunity to undo the havoc and upheaval wrought by *Smith v Globe Life* and restore to Michigan's consumers the protection envisioned by the legislature when it enacted the MCPA.

The MCPA is a remedial statute that must be broadly construed in favor of the consumers it was intended to benefit. To that end, its exemptions must be narrowly construed. Courts across the country have recognized that the purpose of the "specifically authorized" exemption is to avoid "a direct and unavoidable conflict" between the application of the MCPA and other regulatory schemes. As the majority of Courts have recognized, a "specifically authorized" exemption is much narrower than a "regulated" exemption.

In construing the "specifically authorized" exemption, the proper focus is on the method, act or practice prohibited, rather than on whether the accused entity is licensed or regulated. The appropriate test is whether there is a direct and unavoidable conflict in applying both the MCPA and the OC. Here, the prohibited methods, acts or practices set forth in both the MCPA and OC are complementary, and do not conflict. Thus, there is no reason to exempt residential licensed builders, as a whole, from the reach of the MCPA. Indeed, to do so would potentially leave thousands of Michigan consumers without adequate remedies when confronted with unfair or deceptive methods, acts or practices in the context of what, for most, is a consumer's most expensive and important investment – the building or remodeling of a home.

Moreover where, as here, the legislature has provided for both private and attorney general enforcement of the MCPA, the majority of courts have recognized an intent to provide "a broad delegation of enforcement tools." Such an intent is even more evident in the MCPA's provisions,

§17-21, authorizing various governmental agencies to investigate MCPA violations and report back to the attorney general. The MCPA's combination of provisions, intertwining private, attorney general and regulatory agency enforcement establishes an enforcement scheme that would be frustrated by allowing an automatic exemption for entities licensed or regulated under other statutes.

## RELIEF REQUESTED

Plaintiffs-Appellees respectfully request that this Court reaffirm its holding in *Attorney General v Diamond Mortgage* by rejecting the unfortunate "general transaction" language used in *Smith v Globe Life* and holding that regulation under the Occupational Code does not exempt licensed residential builders from the reach of the MCPA. Plaintiffs-Appellees further request that this Court affirm the trial court's denial of Defendants-Appellants' Motion for Summary Disposition.

Respectfully submitted,

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